Introduction to the Death Penalty

One of the most powerful, and controversial, means by which any government can enforce its criminal law is through the administration of the death penalty. It is reported that the United States is one of 87 countries that currently retains this form of punishment. Within the United States, 38 states and the federal government (including the military) retain the death penalty. The remaining 12 states and the District of Columbia have voted to abolish it.[1]

The death penalty has ancient origins, and, for most of human history, it was the standard punishment for many offenses. For example, in Britain during the 1700s, pickpocketing was a capital offense. Similarly, horse thieves were often executed by hanging in the Western parts of the United States during the later half of the nineteenth century. Moreover, many forms of execution were brutal, if not plainly barbaric, e.g. breaking at the wheel.

Fortunately, in the United States, the Eighth Amendment's ban on cruel and unusual punishment has both limited the types of offenses punishable by death, as well as the methods that may be used to carry out such punishments. For all practical purposes, currently, the death penalty is only permitted in cases of murder, and, it is carried out by only one of five means: 1) lethal injection, 2) lethal gas, 3) electrocution, 4) hanging, and 5) firing squad.

Proponents of capital punishment often argue that it serves two very important purposes in a civilized society: 1) retribution (inflicting punishment on an individual who deserves to be punished) and 2) deterrence (providing an incentive for people not to

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[1] http://www.deathpenaltyinfo.org/article.php?did=121&scid=11

engage in conduct that has no place in society). Opponents of capital punishment often argue that 1) the state does not have the right to inflict retribution of this magnitude and 2) that there is no proof that the death penalty serves as a deterrent.

Legal Background: The Death Penalty in the United States

Throughout the history of the United States, citizens, lawyers, and judges have wrestled, and continue to wrestle, with both the legality, and morality, of capital punishment.

At the time of its adoption, the Constitution (including the Bill of Rights) seemed to condone the death penalty. For instance, Article I, Sections 9 and 10 prohibit Bills of Attainder. Such bills were Acts of a legislative body that declared a person guilty of a capital offense without a trial. These constitutional provisions made no mention, however, of prohibiting capital punishment after a fair trial. Similarly, the Fifth Amendment states in pertinent part that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger ... ."

Yet, the Constitution did place restrictions on the imposition of the death penalty, principally in the form of the Eighth Amendment. The Eighth Amendment states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Thus, from the beginning of this nation's history, many of the brutal punishments that were common in Europe and elsewhere in the world were prohibited within the borders of the United States.

Probably due to the Constitution's explicit acknowledgment of capital punishment, its constitutionality was not directly challenged until Furman v. Georgia (1972). In this case, the Supreme Court temporarily put a halt to executions in the United States. Seven justices agreed that, as currently imposed, the death penalty constituted a "cruel and unusual punishment" in violation of the Eighth Amendment (as incorporated to the states through the due process clause of the Fourteenth Amendment).[2]

Only two justices, William Brennan and Thurgood Marshall, believed that the death penalty was unconstitutional under all circumstances. While acknowledging that capital punishment was permitted at the time of the adoption of the Constitution, they argued that "evolving standards of decency that mark the progress of a mature society" resulted in the death penalty becoming obsolete. The "evolving standards of decency" criterion had been first used by the Court in Trop v. Dulles (1958). In this case the Court held that a law that deprived military deserters of U.S. citizenship violated the Eighth Amendment.

The other five justices in the Furman majority did not hold that the death penalty was per se unconstitutional, but simply held that the death penalty procedures currently in use resulted in death sentences being handed down in such an arbitrary fashion that they violated the Eighth Amendment. When the states subsequently enacted new legislation to remedy the defects that the Court pointed out in Furman, e.g. unlimited jury discretion to sentence someone to life imprisonment or death, the Court ruled in Greg v. Georgia (1976) that executions could resume in the United States. In Greg, the Court approved sentencing

[2]Under the Supreme Court's constitutional jurisprudence, the "due process clause" of the Fourteenth Amendment incorporates (applies) almost all provisions of the Bill of Rights to the states. Therefore, whenever an Amendment is cited in this material, e.g. the Eighth Amendment, it is also applicable to the states by the "due process clause" of the Fourteenth Amendment.

that provided for a bifurcated trial. In a bifurcated trial, the jury would first determine guilt or innocence, and then, if the defendant were found guilty, the appropriate sentence, a life term or death. The Court in Greg also sanctioned the use of a list of aggravating and mitigating factors that would provide standards to help the jury determine whether or not the defendant should receive the death penalty. This removed the jury's unlimited discretion in capital cases.

Principal Supreme Court Death Penalty Precedents

In the years since the Greg v. Georgia decision, the Court has continued to interpret the Eighth Amendment and to provide guidance on the subject of when capital punishment may be administered. Some of the landmark decisions in this area follow.

Supreme Court Cases

The death penalty is appropriate for what crimes?

Coker v. Georgia (1977)–A sentence of death for rape violates the Eighth Amendment (effectively, the death penalty may now only be imposed for the crime of first-degree murder).

Who can be executed?

Ford v. Wainwright (1986)–The execution of an individual who becomes legally insane after conviction but before execution violates the Eighth Amendment.

Thompson v. Oklahoma (1988)–A death sentence for an individual who was 15 when he committed a murder violates the Eighth Amendment.

Stanford v. Kentucky (1989)–A death sentence for persons 16 and 17 years old when they committed the crime of murder does not violate the Eighth Amendment. (The Supreme Court is currently reexamine this holding in the case of Roper v. Simmons).

Atkins v. Virginia (2002)–The execution of mentally retarded individuals violates the Eighth Amendment (overrules Penry v. Lynaugh, 1989).

What means of execution are permitted?

Glass v. Louisiana (1985)–Death by electrocution does not violate the Eighth Amendment.

What factors must be considered during the punishment phase of the trial, and by whom?

Woodson v. North Carolina (1976)–Mandatory death sentences violate the Eighth Amendment. The jury must be afforded the opportunity to spare a defendant's life based on the particular circumstances of a defendant's case and the circumstances of the defendant's background.

Lockhart v. Ohio (1978)–Defendants must be allowed to present all mitigating evidence relating to their "character, record, and circumstances of the crime" which may spare them from death.

Ring v. Arizona (2002)–Permitting a sentencing judge, and not a jury, to find aggravating circumstances to sentence a defendant to death violates the defendant's Sixth Amendment right to have a jury determine the relevant facts of a case.

Provisions of the U.S. Constitution Pertinent to the Death Penalty

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury ....

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been preciously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Lockhart v. McCree, 476 U.S. 162 (1986) - Death Penalty Qualified Juries

Facts: McCree was involved in a robbery of a gas station in Arkansas. During the course of the robbery, he shot and killed the station's owner and then fled in a maroon and white Lincoln Continental. The next day, an officer stopped and arrested McCree after noticing that the vehicle that he was driving matched the description of the vehicle involved in the service station robbery-murder. McCree agreed to speak with the police and told them that, although he was present at the service station at the time of the murder, he was not the one who killed its owner. McCree argued that another individual had asked him for a ride, took his gun, and committed the robbery-murder. Afterward, McCree claimed that this individual got back into the car, had McCree drive him to a dirt road, and then left with his gun. Several witnesses contradicted McCree's version of the story, and said that they only saw one individual present in the car. The gun was found on the dirt road. Ballistics tests proved that it was the gun used to kill the station owner.

McCree was subsequently indicted for capital murder. During jury selection, he objected to the court's removal for cause of several jurors who said that they were fundamentally opposed to capital punishment and that they could not vote for a sentence of death under any circumstance. McCree argued that excluding persons who are fundamentally opposed to capital punishment from the jury deprived him of a jury that constituted a "fair cross-section" of the community in violation of the Sixth Amendment. Ultimately, eight individuals were excluded for this reason.

The empaneled jury found McCree guilty of capital murder; however, it imposed a life sentence in lieu of the death penalty. On appeal, McCree relied on evidence provided by social science studies that demonstrated that "death qualified jurors" were more "conviction prone" than non death-qualified jurors. He argued that he was not tried by an impartial jury, in violation of the Sixth Amendment.

Issue: Was McCree deprived of his right to an impartial jury because the trial court excluded those jurors who would not impose capital punishment?

Answer: No.

Reasoning: A majority of the Court, through Chief Justice William Rehnquist, rejected McCree's position, arguing that the procedures that states have enacted to ensure "death qualified" juries in capital cases do not violate the Sixth Amendment. First, the Court rejected McCree's argument that excluding individuals who are fundamentally opposed to capital punishment results in a jury that is not composed of a "fair-cross-section of the community" in violation of the Sixth Amendment. The Court said it is practically impossible to provide a "truly representative" jury to every criminal defendant. In other words, a jury, being limited to 12 persons, simply cannot be composed of individuals sharing every possible belief. Moreover, the Court noted that it has never struck down challenges for cause or peremptory challenges on the grounds that they did not provide the defendant with a "fair-cross-section" of the community.[3]

[3]Please note: In certain cases, the Court did place limits on the use of preemptory challenges, but not on "fair cross-section" grounds. For instance, in Batson v. Kentucky (1986), the Court held that such challenges could not be used by the prosecution to exclude minorities from a jury.

Next, the Court stated that, even if, for the sake of argument, it were to address this case from the standpoint of whether or not McCree's jury constituted a "fair-cross-section" of the community, his arguments would still fail. This is due to the fact that a "fair-cross-section" requires the presence of "distinctive groups." The presence of these "distinctive groups" is necessary for: 1) "guarding against the exercise of arbitrary power," 2) protecting "public confidence in the fairness of the criminal justice system," and 3) promoting the idea that "sharing in the administration of justice is a phase of civic responsibility."

According to the Court, "distinctive groups" principally refer to such categories as race and gender–in short, to those characteristics over which an individual does not have any control. Since individual jurors, even if they have "scruples" about the death penalty, are at liberty to vote for the death penalty if the law so requires, the Court stated that one's beliefs about the death penalty are under the individual's control. Moreover, the Court noted that such individuals are not excluded from all jury service. Therefore, excluding potential jurors who are fundamentally opposed to the death penalty under all circumstances from capital cases does not violate the Sixth Amendment.

Finally, the Court also rejected McCree's claim that "death qualified" juries are more likely to convict than non death-qualified juries. In this regard, the Court seemed to question (though, it ultimately accepted as true for purposes of this case) some of the social science evidence used in support of McCree's position (e.g. one study used by McCree held that the exact same jury that convicted him would not have been biased if it happened to be chosen at random, but since it was selected according to procedures established by the state, it is biased). Moreover, the Court stated that "it is simply not possible to define

impartiality for constitutional purposes ...." If the Court were to accept McCree's argument, judges could be required to find a jury composed of an "appropriate" balance of almost any given factor, e.g. "the proper number of Democrats and Republicans, young persons and old persons, white collar executives and blue-collar laborers, and so on."

Dissent: Justice Marshall (writing for Justices William Brennan and John Paul Stevens) believed that there was merit to the social science studies that were put forth in this case. Moreover, he noted certain evidence that showed a correlation between an individual's view on the death penalty and certain other characteristics that the Court has traditionally observed with great scrutiny, e.g., race and gender ("distinctive groups"). For instance, he noted that the exclusion of persons who were fundamentally opposed to capital punishment under all circumstances resulted in larger numbers of minorities and women being excluded from capital jury service. Since these individuals were capable of being impartial during the guilt phase of the trial, Justice Marshall suggested that perhaps two different juries be used in capital cases: one to determine guilt or innocence and a second to determine the appropriate punishment, if necessary.

Second, Justice Marshall believed that there was some merit to McCree's argument (as supported by the appropriate social science evidence) that "death- qualified" juries were more likely to convict than non death-qualified juries. For instance, he was concerned that the focus on punishment in capital cases before the trial even begins may unduly influence jurors.

Finally, Justice Marshall also noted that, regardless of how the Court ruled concerning the removal for cause of jurors fundamentally opposed to capital punishment, the existence of peremptory challenges would provide a means for lawyers to get around

the Court's holding. For instance, if the Court were to adopt Justice Marshall's views in the future and hold that "death-qualified" juries violated the Sixth Amendment, lawyers could empanel de facto death-qualified juries by simply excluding individuals fundamentally opposed to capital punishment by means of their peremptory challenges.